U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 2 4 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition, which was then appealed to Administrative Appeals Office (AAO). The appeal was dismissed. This motion to reopen or reconsider that dismissal was then filed with the AAO. The motion will be dismissed.

The petitioner is an IT consulting business, and it seeks to employ the beneficiary as a software engineer as an alien holding an advanced degree pursuant to Section 203(b)(2) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1153(b)(2). The director found that the petitioner did not have the continued ability to pay the proffered wage of $76,960 per year. The petitioner appealed that decision to the AAO. The AAO decision agreed with the director that the petitioner failed to establish that it possessed the continued ability to pay the proffered wage.

The petitioner filed the appeal on March 7, 2008, and indicated that a brief and additional evidence would be provided within thirty (30) days. The AAO issued its decision on March 15, 2012, forty-eight (48) months later. At the time of the decision, the petitioner had provided neither a brief nor additional evidence.

The AAO decision noted that the petitioner had filed 185 petitions for alien workers since 2004, twenty-one (21) of which were Form I-140 petitions. The AAO decision noted that according to available records, it had found the priority dates and proffered wages for four of the petitioner's other beneficiaries. The AAO decision analyzed the petitioner's available financial data and the wages of the other known beneficiaries, and concluded that the petitioner could not establish its continued ability to pay the proffered wage.

The AAO also found, beyond the director's decision, that the petitioner failed to establish that the beneficiary possessed the minimum educational criteria listed on the labor certification.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was *not available and could not have been discovered or presented in the previous proceeding.*[1] Emphasis added.

The regulations at 8 C.F.R. § 103.5(a)(3) state that "[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

In an attempt to provide new evidence that was "not available and could not have been discovered or presented in the previous proceeding" the petitioner provided Forms W-2 issued by the petitioner to the beneficiary showing wages paid from 2006 through 2011. We first note that the petitioner does not provide evidence explaining how the Forms W-2 for 2006 and 2007 were not available or could not have been discovered at the time of the appeal on March 7, 2008. Furthermore, all of the Forms W-2 fail to establish that the petitioner paid the beneficiary the full proffered wage. Thus, the evidence provided does not establish that the prior decision was in error.

The petitioner also provided Forms 1120S for 2007 through 2011. The petitioner did not explain why the Form 1120S was not available within thirty (30) days of the filing of the appeal, or why the tax returns were unavailable at any time during the four years the appeal was pending.

In the brief accompanying the motion, counsel asserts that the petitioner withdrew the petitions on behalf of the other beneficiaries discussed in the AAO decision in 2007 and 2009. There is no evidence in the record that the petitioner actually withdrew the petitions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, assuming the three named beneficiaries represented the only other wages the petitioner was committed to pay, the purported withdrawals would not alter the analysis in the decision, and the petitioner still lacked the ability to pay the proffered wage based upon its tax returns until after 2009. However, the petitioner in its brief submitted with the motion failed to discuss the other 182 petitions filed by the petitioner. Thus, the petitioner failed to provide any new evidence or argument addressing a critical piece of the AAO's decision.

The petitioner argued in its brief that the AAO erred by relying on the credential evaluations performed by the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). The petitioner also submitted credential evaluations from A dated September 27, 2007, and J lated September 24, 2007. We note that our reliance on the opinions provided by EDGE has routinely been upheld by reviewing courts.[2] Furthermore, the evaluations provided by the petitioner on appeal both predate

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[2] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

the AAO's decision cannot be considered "new" evidence under the definition found in the regulation.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

As the motion does not surmount the high burden, it must be denied.

ORDER: The motion to reopen and reconsider is rejected. The previous decision of the AAO is affirmed. The petition remains denied.